

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ELSIE TRUJILLO,

Plaintiff,

v.

No. CIV-15-0936 LAM

**CAROLYN W. COLVIN, Acting Commissioner
of the Social Security Administration,**

Defendant.

ORDER GRANTING DEFENDANT’S MOTION TO DISMISS [Doc. 13]

THIS MATTER is before the Court on *Defendant’s Motion to Dismiss (Doc. 13)*, filed January 11, 2016. Plaintiff filed a response to the motion on January 15, 2016. [*Doc. 14*]. No reply to the motion has been filed and the time for doing so has passed. Having considered the motion, response, record of the case, and relevant law, the Court **FINDS** that the motion shall be **GRANTED** and this case shall be **DISMISSED without prejudice**.

In Defendant’s motion to dismiss, Defendant states that Plaintiff failed to exhaust her administrative remedies by failing to request review of the decision of the Administrative Law Judge (“ALJ”) by the Appeals Council. [*Doc. 13* at 5]. Therefore, Defendant contends that this Court lacks subject matter jurisdiction over Plaintiff’s claims and asks the Court to dismiss Plaintiff’s case under Fed. R. Civ. P. 12(b)(1). *Id.* at 5-6. Defendant does not state in her motion to dismiss whether she is seeking dismissal of Plaintiff’s case with prejudice or without prejudice.

In Plaintiff's response, Plaintiff states that she "agrees that this case was filed prematurely, but requests that the case be dismissed without prejudice" "so that her right to appeal any Appeals Council denial remains intact." [*Doc. 14* at 1]. Plaintiff explains that she filed this case within sixty (60) days of the ALJ's decision "based on [Plaintiff's] mistaken belief that her case had already been denied by the Appeals Council." *Id.* Plaintiff states that she "is requesting an extension of time from the Appeals Council to file her appeal in that venue under 20 C.F.R. § 404.911(b)(8), because she can establish good cause if she submitted her appeal to another government agency in good faith, within the time limit." *Id.* Plaintiff "therefore requests that this Court dismiss this case without prejudice so that her right to appeal any Appeals Council denial remains intact." *Id.* Plaintiff further states that Defendant "does not agree that this Court should dismiss this case without prejudice." *Id.* at 2.

The Court finds that Defendant's motion to dismiss shall be granted since this Court is without jurisdiction to hear Plaintiff's claims absent exhaustion of her administrative remedies. *See* 42 U.S.C. § 405(g) (explaining that a party may seek review of a "final decision of the Commissioner of Social Security") and 28 C.F.R. § 404.900(a)(5) (explaining that the review of the ALJ's decision by the Appeals Council constitutes a final decision that can be appealed to a Federal district court). In addition, the Court will grant Plaintiff's request to dismiss this case without prejudice. The Court notes that Defendant did not ask in her motion to dismiss for dismissal of this case with prejudice, and did not file a reply to Plaintiff's response explaining why she does not agree that this Court should dismiss this case without prejudice. Moreover, dismissal of this case without prejudice is appropriate because the Court's dismissal of Plaintiff's case is not on the merits. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216-17 (10th Cir. 2006) (recognizing the rule that "where the district court dismisses for lack of

jurisdiction . . . the dismissal must be without prejudice” because a court without jurisdiction may not “make any determination of the merits of the underlying claim”).

IT IS THEREFORE ORDERED that, for the reasons stated above, *Defendant’s Motion to Dismiss (Doc. 13)* is **GRANTED** and Plaintiff’s claims and this case are hereby **DISMISSED without prejudice**.

IT IS SO ORDERED.


LOURDES A. MARTÍNEZ
UNITED STATES MAGISTRATE JUDGE